FILE COPY

FILED
SEP 23 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1968

No. 553

THE S. C. STATE BOARD OF EDUCATION, a Public corporate body, and CYRIL B. BUSBEE, State Superintendent of Education, et al. *Appellants*

and

MRS. ERNEST T. CRIBB, et al. *Intervenors-Appellants*

VERSUS

J. ARTHUR BROWN, et al. *Respondents*

and

UNITED STATES OF AMERICA, by Ramsey Clark, Attorney General of the United States, *Intervenor-Respondent*

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES, FOR THE DISTRICT OF SOUTH CAROLINA, COLUMBIA DIVISION

JURISDICTIONAL STATEMENT

DANIEL R. MCLEOD,
Attorney General of S. C.

D. W. ROBINSON,
P. O. Box 11959
Columbia, South Carolina
Attorneys for Appellants,
The S. C. State Board of Education and State Superintendent of Education.

INDEX

	Page
Jurisdictional Statement	2
Opinion Below	2
Jurisdiction	2
Statutes Involved	2
Questions Presented	6
Statement	7
The Questions Presented Are Substantial	8
Conclusion	12
Appendix	14

CITATIONS

	Page
Angle v. Chicago Ry. Co. 151 U. S. 1 (1894)	9
Arizona v. California 283 U. S. 423 (1931)	9
Board of Education v. Allen 20 L. Ed. 2d 1060 (1968)	8, 10
Brown v. Board of Education 347 U. S. 483 (1954)	7, 8, 11, A-2, A-6
Cooper v. Aaron 358 U. S. 1 (1958)	10, A-7
Daniel v. Family Security Ins. Co. 336 U. S. 220 (1949)	9
Fletcher v. Peck 6 Cranch 87, 3 Law Ed. 162	9
Griffin v. State Board of Education 239 F. Supp. 560 (1965)	10, A-7
Lee v. Macon County Board of Education 267 F. Supp. 458 (1967)	11, A-2, A-7
Mayo v. Lakeland Highlands Canning Co. 309 U. S. 310 (1940)	12
New Ice Co. v. Liebman 285 U. S. 262 (dissent of Mr. Justice Brandeis)	9, A-8
Poindexter v. Louisiana Assistance Commission 275 F. Supp. 833, (1967) Aff. 389 U. S. 571 (1968)	11, 12, A-2, A-7
Public Service Commission of Wisconsin v. Wisconsin Telephone Co. 289 U. S. 67 (1933)	12

CITATIONS—Continued

	Page
United States v. Georgia Public Service Commission 371 U. S. 285 (1963)	2
United States v. National Dairy 372 U. S. 29 (1963)	10
United States v. O'Brien 20 L. Ed. 2d 672 (1968)	9
Zorach v. Clauson 343 U. S. 306 (1952)	9

STATUTES

	Page
Act No. 297, 1963 (53) 498, Supp. 1962 Code, Sections 21-297 through 21-297.8.	2

MISCELLANEOUS

	Page
Rules Promulgated by State Board of Education (1962 Code, Vol. 17, 1967 Supp., p. 77)	A-3

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1968

No._____

THE S. C. STATE BOARD OF EDUCATION, a Public Corporate Body, and CYRIL B. BUSBEE, State Superintendent of Education, et al. *Appellants*

and

MRS. ERNEST T. CRIBB, et al. *Intervenors-Appellants*

VERSUS

J. ARTHUR BROWN, et al. *Respondents*

and

UNITED STATES OF AMERICA, by Ramsey Clark, Attorney General of the United States,

Intervenor-Respondent

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES, FOR THE DISTRICT OF SOUTH CAROLINA, COLUMBIA DIVISION

JURISDICTIONAL STATEMENT

JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of the United States District Court for the District of South Carolina, entered May 31, 1968, enjoining the enforcement of the South Carolina Scholarship Grant statute and submit this statement to show that this Court has jurisdiction of the appeal and that substantial questions are presented.

OPINION BELOW

The opinion of the United States District Court for the District of South Carolina, Columbia Division, convened as a three-judge District Court (App. Infra pp. 1-3) is reported at ..... F. Supp.....

JURISDICTION

Respondents instituted this action in the District Court seeking to enjoin implementation of the South Carolina Scholarship Grant Act of 1963 which provides for the payment of scholarship grants to every school child in South Carolina who has not yet finished high school, and who desires to attend a private, non-parochial school in South Carolina, and asking a declaratory judgment that such Act is unconstitutional as in contravention of the equal protection clause of the Fourteenth Amendment. Judgment of the District Court (App. infra pp. 1-3) was entered May 31, 1968, and its order denying a rehearing, a new trial and a modification of the judgment (App. Infra. p. 9) was entered June 27, 1968. Notice of Appeal was filed July 26, 1968, in the United States District Court, District of South Carolina, Columbia Division. This Court has jurisdiction of this appeal under 28 U.S.C.A. 1253, 2101(b). *United States v. Georgia Public Service Commission*, 371 U.S. 285, 287.

STATUTES INVOLVED

The provision of the Scholarship Grant Act of 1963

(1963 Acts 498, Supplement 1962 Code 21-297 through 21-297.8) are as follows:

No. 297

An Act To Provide State Scholarship Grants; To Fix The Amount Thereof; To Provide For The Supplementing Of Such Grants By The School Districts Of The State; To Vest In The State Board Of Education The Power And Duty To Make Rules Governing Scholarship Grants; To Fix Penalties For Misapplication Of Scholarship Funds And For Other Purposes.

Be it enacted by the General Assembly of the State of South Carolina:

Section 1. Findings of General Assembly.—The General Assembly finds that the cause of primary and secondary education in South Carolina will be advanced if individual children of school age, their parents and guardians, are made free to choose between public and private educational institutions. Provision has been made for the transfer of pupils from one public school to another, subject to such limitations as may be necessitated by local conditions, and it is considered highly desirable that the freedom to choose among available educational institutions be extended and enlarged by providing scholarship grants for children entitled to attend primary and secondary public schools who wish to attend private or independent institutions, such scholarship grants to be furnished from State funds supplemented by local school dictricts.

Section 2. Definitions. — The following words and phrases as used in this act shall, unless a different meaning is plainly required by the context, have the following meanings:

(a) "School Child" shall mean any person between the ages of six and twenty whose domicile is with his or her parent within the State and who is otherwise qualified to

attend the public schools of any school district in which he or she resides.

(b) "Parent" shall mean the natural or adoptive parent or the guardian having legal custody of a child eligible and entitled to receive a scholarship grant under this act who is actually paying or who will pay the tuition cost of attendance of such child at a school which qualifies such child to receive a grant under the terms of this act.

(c) "Private School" shall mean a private or independent elementary or high school which is not operated or controlled by any church, synagog, sect or other religious organization or institution.

Section 3. Persons eligible to receive scholarship grants. —Subject to the terms and provisions of this act every school child in the State who has not yet finished or graduated from high school and who desires to attend a private school located within the State shall be eligible for and entitled to receive a State scholarship grant in an amount equal to the per pupil cost to the State of public education as certified by the Governor.

Section 4. Funds for grants.—The State scholarship grants provided for in Section 3 of this act shall be payable from funds appropriated by the General Assembly for the payment thereof.

Section 5. Local school district to furnish funds.—It shall be a prerequisite to the grant above permitted that the local school district in which the school child resides make available a grant of local funds to such school child and to that end the trustees of each school district within the State are hereby authorized to appropriate funds in addition to the State scholarship grants provided for in Section 3 of this act in such amount that is equal to the per pupil cost to the school district exclusive of all State funds received for such purposes. The trustees of each school district are authorized to levy taxes where the school district has the power to tax,

to raise funds for the payment of such local supplements to the State scholarship grants. The State Board of Education shall render such assistance to the trustees as may be necessary to determine annual per pupil expenditures of the school district for the purpose of fixing the amount of any supplement to be paid under this section.

Section 6. Grant not to exceed tuition.—The total of the annual scholarship grant provided for each child by this act shall not exceed the actual cost of tuition at the private school attended by the child.

Section 7. Rules and regulations.—The State Board of Education is hereby authorized and directed to promulgate such rules and regulations, consistent with the terms of this act, for the receiving and processing of applications for scholarship grants, the payment of grants and the administration of this act generally as it may find necessary or desirable. Such rules may, among other things, provide for the payment of scholarship grants by the school districts of the State to the parent of any child entitled to receive a scholarship grant in installments or otherwise, and for the proration of scholarships for children attending school less than a full school year; they shall include a minimum academic standard that shall be met by any school in order to entitle children attending such school to receive a scholarship grant; *provided*, however, that no rule promulgated under the authority of this act shall restrict, or in any way affect, the requirements of such school concerning the eligibility of pupils who may be admitted thereto or specify minimum physical plant facilities of any such school.

Section 8. Unlawful to misuse scholarship funds.—It shall be unlawful for any person to obtain, attempt to obtain, expend or attempt to expend, any scholarship funds provided by this act for any purpose other than in payment of, or reimbursement for, the tuition cost of the child to whom such scholarship has been awarded at the institu-

tion he or she is authorized to attend under his or her scholarship grant.

Section 9. Penalties.—Any person convicted of violating the provisions of this act shall be punished by imprisonment for a term not to exceed three years or by a fine not to exceed two thousand dollars, or by both, in the discretion of the court.

Section 10. Saving clause.—If any portion of this act, or the application thereof to any person or circumstances is, for any reason, declared unconstitutional, such declaration shall not affect the validity of the remaining portions of this act or its application to other persons and circumstances.

Section 11. Repeal.—All acts or parts of acts inconsistent herewith are repealed.

Section 12. Time effective.—This act shall take effect upon approval by the Governor.

Approved the 5th day of June, 1963.

QUESTIONS PRESENTED

1. May a District Court of the United States, in considering the constitutionality of a state statute, inquire into the motive or purpose of the legislators?

2. Is the necessary effect of the South Carolina Scholarship Grant Act to deprive respondents of the equal protection of the laws?

3. Does the South Carolina Scholarship Grant Act deprive any of the respondents of the equal protection of the laws under the Fourteenth Amendment?

4. May a District Court of the United States declare a state statute unconstitutional, as in violation of the Fourteenth Amendment, without supporting such a conclusion with appropriate findings of fact?

STATEMENT

This action was commenced as a class action by Negro citizens seeking to enjoin the implementation of the South Carolina Scholarship Grant Act, alleging that the Act was passed for the purpose of depriving respondents of the equal protection of the laws under the Fourteenth Amendment and therefore is unconstitutional. The respondents alleged that jurisdiction for the action arose under the Fourteenth Amendment, and under 28 U.S.C.A. 1331, 1343, 2281, 2284 and 42 U.S.C.A. 1981, 1983, and asked declaratory relief for the class pursuant to 28 U.S.C.A. 2201, 2202 and Rule 57, Fed. Rules of Civ. Proc.

The District Court of the United States issued *ex parte* orders dated March 9, 1965 and March 12, 1965, temporarily enjoining the making of payments under the Act until the case could be heard on the merits, and thereafter denied defense motions to vacate the temporary restraining orders.

The United States filed its complaint in intervention October 1, 1965, pursuant to Civ. Rts. Act of 1964 (42 U.S.C.A. 2000 (h)-2) alleging substantially the same facts as those alleged in the amended complaint of the original plaintiffs, and that the purpose and effect of the adoption and implementation of the Scholarship Grant Act was to unconstitutionally circumvent school desegregation requirements first enunciated in *Brown v. Board of Education*, 347 U.S. 483 (1954).

The appellants, State Board of Education and the State Superintendent of Education, answering respondents' amended complaint and that filed by the United States, denied knowledge of any racial discriminatory policy of the several private schools mentioned in the complaint and denied the unconstitutionality of the statute. The defendant school districts denied any information as to discriminatory enrollment policies of the several private schools and

denied the invalidity of the statute. Intervenors-appellants, parents of children attending two of the private, non-parochial schools and entitled to scholarship grants under the statute, intervened and pled the validity of the statute.

On August 28, 1967, the cause was heard on its merits before the Hon. Albert V. Bryan, Circuit Judge, the Hon. J. Robert Martin and the Hon. Robert W. Hemphill, District Judges, sitting as a three-judge District Court. In a *per curiam* opinion filed May 31, 1968, the Court held: "Act No. 297 is unconstitutional. A review of the record, including the historical background of the Act, clearly reveals that the purpose, motive and effect of the Act is to unconstitutionally circumvent the requirement first enunciated in *Brown v. Board of Education*, 347 U.S. 483 (1954), that the State of South Carolina not discriminate on the basis of race or color in its public educational system." The Court permanently enjoined appellants from enforcing the statute. Appellants filed a motion for a rehearing, a new trial and for a modification of the judgment (App. infra pp. 6-8), which motion was denied by order of June 27, 1968. (App. infra p. 9).

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The Court in *Brown v. Board*, 347 U.S. 483, 493 (1954) said: "Today education is perhaps the most important function of state and local government". More recently in *Board of Education v. Allen*, 20 L. Ed. 2d 1060, 1068 (1968) the Court noted that private school education plays a significant role in raising the levels of knowledge. High quality education, whether public or private is an "indispensable ingredient" in the kind of nation Americans desire.

Recognizing its responsibility to provide quality education for its children and to give to them the opportunity of finding this education in private or public schools, South

Carolina enacted the statute here in issue to give to every child the choice of attending a public school or a private non-parochial school located within the state. A scholarship grant equivalent to the per pupil cost to the state of public education was made available to the parent provided the school district made available the per pupil cost to the district of public education.

The General Assembly in Section 1 of the Act finds that the cause of education will be advanced if the school child is free to attend the school best fitted to his talent and ability be it public or private. This finding that education is benefited if both public and private schools are available is supported by the uncontradicted evidence of educators found in the record here. There is no place in our industrialized society for the uneducated and the unskilled. States are seeking new ways and new methods to bring quality education to all children. This scholarship grant statute is one of the new ways. The need for education is so great that states should experiment even if some experiments fail. *New Ice Company v. Liebman*, 285 U.S. 262, 311 (dissent of Mr. Justice Brandeis)

1. In concluding that the South Carolina statute violated the Fourteenth Amendment because of the purpose and motive of the legislature, the District Court departed from the firmly established rule that in passing on the constitutionality of statutes Courts do not consider the motives and purposes of the legislature. *United States v. O'Brien*, 20 L. Ed. 2d 672, 683 (1968); *Arizona v. California*, 288 U.S. 423, 455 (1931); *Zorach v. Clauson*, 343 U.S. 306, 310 (1952); *Daniel v. Family Security Ins. Co.*, 336 U.S. 220, 223 (1949). If the legislature has the constitutional power to enact the statute the Court does not concern itself with its wisdom. *Angle v. Chicago Ry. Co.*, 151 U.S. 1, 18 (1894). Even corrupt motive is not a question for judicial inquiry. *Fletcher v. Peck*, 6 Cranch 87, 3 Law Ed. 162.

2. The effect of this statute does not deny equal protection to any school child. It applies to all children—black and white. The grant may be used at any private, nonparochial school located in South Carolina. The obvious effect of the statute is to bring private education within the financial reach of the children of persons in the lower income groups. Since Negro citizens are more likely to be found in these lower economic brackets the statute is of particular value to them.

The language of the statute, which has received no construction from South Carolina Courts, does not restrict the use of the grant to schools which accept children of both races. A district court in Virginia did not find the use of similar grants at a racially segregated school a violation of the equal protection clause provided the grants did not constitute the principal financial support of the school. *Griffin v. State Board*, 239 F. Supp. 560 (1965). In *Board v. Allen*, 20 L. Ed. 2d 1060, 1068 (1968) the Court sustained the constitutionality of a New York statute requiring public school authorities to lend textbooks free of charge to students attending private and parochial schools.

But if the statute is valid only if the grant is used at a school which admits children of all races, which may be the teaching of *Cooper v. Aaron*, 358 U.S. 1, 19 (1958), then the General Assembly is presumed to have used the term private school in this restricted sense because of the presumption that a legislature complies with constitutional limitations. *United States v. National Dairy*, 372 U.S. 29, 32 (1963).

If the private school accepting from a parent tuition furnished by the state is for Fourteenth Amendment purposes a "public school", then the remedy of the plaintiffs is to apply for admission and if admission is denied because of race apply to a court for relief similar to that accorded children denied admission to public schools because of race.

Such relief is not appropriate here because plaintiffs have not sought admission to any of the private schools mentioned in the pleadings, have not asked for such relief and because the private schools are not parties to this action.

3. In its brief order holding the statute invalid because "the purpose, motive and effect of the Act is to unconstitutionally circumvent the requirement xxx that the state of South Carolina not discriminate on the basis of race or color in its public education system" the District Court cited *Lee v. Macon County*, 267 F. Supp. 458 (1967) and *Poindexter v. Louisiana*, 275 F. Supp. 833 (1967) affirmed 389 U.S. 571 (1968). Because *Lee* involved many issues not related to the validity of the tuition grant statute and was not reviewed here we confine our comment to *Poindexter*.

As we read the District Court opinion in *Poindexter* it finds the Louisiana tuition grant statute in contravention of the Fourteenth Amendment for three reasons. First, because the purpose of the statute was to circumvent *Brown* (275 F. Supp. 857). To support this reason it cites numerous Louisiana statutes enacted subsequent to the 1954 *Brown* decision, which statutes have been declared unconstitutional by Federal Courts. We know of no South Carolina statute enacted since 1954 dealing with schools or with race which has been declared invalid by any court. Second, because the tuition grants by Louisiana have "preponderantly" supplied the financial means necessary to establish and maintain "these private schools." By reason of the temporary injunctions issued in this action parents of those attending three of the private schools here involved have received no payments from public funds during the four years of their existence and the parents of the children attending the other two schools received grants for only one semester. Therefore these five schools are not dependent on public funds for their survival. Third, the sys-

tem of private schools nurtured by the Louisiana statute "will shatter to bits the public school system in Louisiana" (275 F. Supp. 856-7). The South Carolina statute can have no such effect because it places the decision as to whether parents may receive tuition grant assistance on the shoulders of the public school trustees of the district of the child's residence. These people are those most interested in preserving public school education. Only 12 of South Carolina's 107 school districts adopted resolutions approving and supporting the grant program and children from only 4 of these 12 applied for grants.

Since the affirmance of the *Poindexter* decree here was *per curiam* we cannot know the reasoning of the Court. We submit, however, that none of the reasons given by the District Court is applicable to the South Carolina statute.

4. The District Court has not supported its conclusion that the South Carolina statute is unconstitutional with any findings of fact as contemplated by Rule 52(a). A decree unsupported by appropriate findings should not be affirmed. *Public Service Commission v. Wisconsin Telephone Co.*, 289 U.S. 67, 69 (1933); *Mayo v. Lakeland Highlands Canning Co.*, 309 U.S. 310, 316 (1940).

CONCLUSION

The questions present substantial federal issues which have been erroneously decided below. The Court should reverse or in the alternative note probable jurisdiction and schedule the cause for a hearing on the merits.

Respectfully submitted.

DANIEL R. MCLEOD,
Attorney General of S. C.
D. W. ROBINSON,
Attorneys for Appellants,
The S. C. State Board of Education and State Superintendent of Education.

September, 1968.

APPENDIX

United States District Court

FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Civil Action No. AC-1655

J. ARTHUR BROWN, et al. *Plaintiffs,*
UNITED STATES OF AMERICA, by RAMSEY CLARK, Attorney General of the United States, *Plaintiff-Intervenor,*

VERSUS

THE SOUTH CAROLINA STATE BOARD OF EDUCATION, a Public Body Corporate, et al., *Defendants,*

and

MRS. ERNEST T. CRIBB, et al., *Intervenors-Defendants.*

Argued May 13, 1968 Decided May 31, 1968

BEFORE BRYAN, FOURTH JUDICIAL CIRCUIT OF THE UNITED STATES, MARTIN AND HEMPHILL, UNITED STATES DISTRICT JUDGES.

Matthew J. Perry, Esq., Ernest A. Finney, Jr., Esq.; Attorneys for Plaintiffs; Hon. Klyde W. Robinson, United States Attorney, John Rosenberg, Esq., Attorney Depart-

ment of Justice, Civil Rights Division; Attorneys for United States, Plaintiff-Intervenor. Hon. Daniel R. McLeod, South Carolina Attorney General, David W. Robinson, Esq.; Attorneys for The South Carolina State Board of Education, Defendants. J. C. Long, Esq., Charles S. Way, Jr., Esq., Coming B. Gibbs, Jr., Esq., Attorneys for Mrs. Ernest A. Cribb, et al., East Cooper School parents, Intervenors-Defendants.

PER CURIAM:

This is a class action in which Plaintiffs, by their amended complaint, and the United States, Plaintiff-Intervenor, by its complaint in intervention, seek to enjoin the implementation of Act No. 297 (1963) of the South Carolina General Assembly.[1] After adoption of the Act the State Board of Education promulgated rules and regulations for implementation of the Act pursuant to Section 7 thereof.[2] The Act provides for the payment of scholarship grants to qualified school children in the State who desire to attend private schools in the State.

On May 9 and 12, 1965, this Court issued temporary restraining orders enjoining the making of payments under the Act until the case could be heard on its merits.

Act 297 is unconstitutional. A review of the record, including the historical background of the Act, clearly reveals that the purpose, motive and effect of the Act is to unconstitutionally circumvent the requirement first enunciated in *Brown v. Board of Education*, 347 U.S. 483 (1954), that the State of South Carolina not discriminate on the basis of race or color in its public educational system. See *Lee vs. Macon County Board of Education*, 267 F. Supp. 458 (M.D. Ala. 1967); *Poindexter* vs. *Louisiana Financial Assistance Commission, et al.*, 275 F. Supp. 833 (E.D. La. 1967), affirmed 389 U.S. 571 (1968).

IT IS THEREFORE ORDERED that the defendants, their members, officers, agents, servants, employees and successors in office and all those who are acting or may act in concert or participation with them, are hereby permanently restrained, enjoined and prohibited from enforcing or seeking to enforce by any means the provisions of Act 297 of the 1963 Session of the South Carolina Legislature.

ORDERED this 31 day of May, 1968.

ALBERT V. BRYAN
United States Circuit Judge
J. ROBERT MARTIN, JR.
United States District Judge
ROBERT W. HEMPHILL
United States District Judge

Footnote 1. This footnote is the statute which is found in the Jurisdictional Statement.

FOOTNOTE 2.

SOUTH CAROLINA CODE OF 1962
VOL. 17, PAGE 71
(CUM. SUPP. 1966)
STATE SCHOLARSHIP GRANTS

Promulgated under authority of § 21-297.5, S. C. Code 1962
(Filed in the office of the Secretary of State August 29, 1963.)

I. *Eligibility for State Scholarship Grants*

When state funds have been made available, scholarships may be granted to any person between the ages of six (sixth birthday on or before November 1) and twenty whose domicile is with his or her parent or guardian within a school district of the State, where the legal trustees choose to accept the Grant in Aid plan and provide the district's pro rata of the cost as provided by the Act: and further who is quallfied and entitled to attend a public school in the district.

II. *Conditions for approval of Scholarship Grants*

Scholarship grants may be approved for use only in non-sectarian private schools between the grades of one and twelve inclusive, located within the State of South Carolina and which meet the minimum requirements prescribed by the State Board of Education.

III. *Amount of Scholarship Grants*

The amount of each scholarship grant shall be an amount equal

to the per pupil cost to the State of public education, as certified by the Governor, provided that the local school district in which the pupil resides shall make available a grant of local funds to such pupil in amount equal to the per pupil cost to the school district, exclusive of all state funds, and further provided that the total annual scholarship grant provided for each child shall not exceed the actual cost of tuition at the private school attended by the pupil.

IV. *Procedure*

The State Department of Education is designated by the State Board of Education as the legal agent for the administration of the State Scholarship Grant program. Applications for scholarship grants shall be made to the board of trustees of the school district in which the pupil resides with his or her parent or guardian on official application forms secured from the board of trustees. Such application, when processed and approved by the board of trustees, showing the amount of district funds reserved for payment of the district's portion of the Grant, shall be forwarded to the State Department of Education. The State Department of Education shall then process the application, listing the pro rata of state funds per pupil, and shall notify the district board of trustees of the amount of state funds for which the pupil is eligible. Any or all of the scholarship grant for any particular pupil sent to the board of trustees not paid to the parent or guardian must be returned to the State Department of Education.

V. *Reimbursement to District School Boards*

The State Department of Education is hereby authorized to reimburse the district board for the State's share of such scholarship grant as provided by law. No payment shall be made by the district board to a parent or guardian until a report has been received from the school in which the pupil is in attendance. The report shall show the length of time in days actually taught and the number of days in which the pupil was in attendance. Full reimbursement shall not be made for any pupil who is not in attendance a minimum of 75 days each semester or 150 days each school session, except where excessive absence has been caused by illness properly certified by a physician. The scholarship grants for pupils who transfer from one school to another will be prorated.

VI. *Minimum Requirements for Private Schools*

a. A private elementary school will not be approved unless the school employs qualified teachers, maintains a proper pupil-teacher ratio, uses the course of study provided by the State

Board of Education through its adoption of textbooks, employs the other necessary staff personnel, and provides adequate library services.

b. A private high school will not be approved unless it meets the minimum standards set up by the State Board of Education for the approval of a private secondary school, such as:

1. Employ a sufficient number of qualified teachers to sustain a curriculum that will include as a minimum the nine basic courses required by the State Board of Education plus electives that will enable a student to earn at least seven additional units.
2. Operate the school not less than five hours a day for 180 days per session with periods of not less than 45 minutes each for regular class periods.
3. Provide sufficient library books and services to supplement and enrich the total school program.
4. Provide adequate guidance services.

VII. *Execution of the Certification by the Board of Trustees*

The board of trustees of any school district which decides to enter into the Scholarship Grant in Aid program may designate, through resolution of the board recorded in the minutes of the board, the chairman or secretary of the board to execute the application blanks for the board; and further a copy of such resolutions must be filed with the State Department of Education.

MOTION OF THE SOUTH CAROLINA STATE BOARD OF EDUCATION AND CYRIL BUSBEE, STATE SUPERINTENDENT OF EDUCATION FOR A REHEARING AND A NEW TRIAL AND IN THE ALTERNATIVE FOR A MODIFICATION OR AMENDMENT OF THE JUDGMENT OF MAY 31, 1968

Pursuant to Rules 52 and 59, The South Carolina State Board of Education and its Superintendent respectfully move the Court to grant a new trial in this cause and to rehear the case for the following reasons.

1. In basing its decision that Act 297 is unconstitutional in part upon the ground that the purpose and motive of the South Carolina General Assembly of 1963 was to circumvent the Fourteenth Amendment requirement that the State not discriminate on the basis of race or color in public education the Court overlooked the principle that the motives and purposes of a legislative body are not a proper subject of judicial inquiry.

2. If the purpose and motive of the 1963 General Assembly were a proper subject for judicial scrutiny then the Court should have found that the purpose of the legislation was to improve the educational opportunities of all of its citizens as that purpose is expressed in the statute itself and in its legislative history and that there was no substantial evidence that there was a motive or purpose to violate the equal protection clause of the Fourteenth Amendment.

3. In basing its order that the tuition grant statute is unconstitutional in part on the proposition that the effect of the Act is to defeat the equal protection clause as interpreted in *Brown v. Board of Education*, 347 U.S. 483, the Court overlooked the well established principle that in passing on the constitutionality of a statute the Court must assume that the Legislature intended the statute to

be within constitutional limits. Therefore, if the Court were of opinion that the holding in *Cooper v. Aaron*, 358 U.S. 1, 19 (1958) that "state support of segregated schools through any arrangements x x funds x x cannot be squared with the Amendment's command x x x" it should have concluded that the South Carolina statute's provision for grants was limited to use in non-segregated schools and therefore constitutional. [See for example, *Griffin v. Board of Education* (E.D. Va. 1965) 239 F. Supp. 560].

4. In relying on *Lee v. Macon County*, 267 F. Supp. 458 (M.D. Ala. 1967), *Poindexter v. Louisiana*, 275 F. Supp. 833 (E.D. La. 1967) aff. 389 U.S. 571 (1968), the Court overlooked the difference in facts present in those cases and those present in the case at bar, differences which make the reasoning of those cases inapplicable here.

In the event the Court denies the motion for a rehearing and for a new trial these defendants ask that the order be modified to permit the use of these scholarship grants at non-segregated private schools for these reasons:

1. The Court in the May 31, 1968 order strikes down Act 297 because it permits the use of public funds at segregated private schools. Since an injunction should be no broader than is necessary, this Court should not prevent the use of these funds at non-segregated schools. *Griffin v. Board*, 239 F. Supp. 560.

2. The type of statute under which a state makes funds available to those seeking an education at private schools offers great possibilities for the improvement of education at the sub-college level. Only one-third of high school pupils in South Carolina attend college. The other two-thirds must receive some skill at a high school age. It is difficult for the public school with its necessarily broad curriculum to furnish this vocational education. Private schools with tuition grant aid can do much to fill this void and minimize unemployment in the next generation. The educa-

tional grants to soldiers by the United States after World War II spawned many vocational educational bodies at which many received skill resulting in jobs. These Federal grants, of course, were available at segregated and non-segregated schools. But if the march of constitutional interpretation today limits the use of grants to non-segregated schools the State should be permitted to experiment with this type of legislation. See for example, *New State Ice Co. v. Liebman*, 285 U.S. 262, 311 (dissenting opinion, Mr. Justice Brandeis).

DANIEL R. MCLEOD,
Attorney General of S. C.

D. W. ROBINSON,
Attorneys for the Movants

June 7, 1968.

ORDER

This matter is before the Court on the motions of the defendants and the intervenor-defendants for a rehearing and a new trial and in the alternative for a modification or amendment of the judgment in this case of May 31, 1968. The Court has considered all matters presented and is of the opinion that the motions should be denied.

IT IS SO ORDERED.

ALBERT V. BRYAN
United States Circuit Judge
J. ROBERT MARTIN, JR.
United States District Judge
ROBERT W. HEMPHILL
United States District Judge

June 27, 1968.

FILE COPY

SEP 25 1968

JOHN F. DAVIS, CLERK

BRIEF OF INTERVENORS-APPELLANTS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 563

THE SOUTH CAROLINA STATE BOARD OF EDUCATION, a public corporate body, and CYRIL B. BUSBEE State Superintendent of Education, et al. ..... APPELLANTS,

and

MRS. ERNEST T. CRIBB, et al, ... INTERVENORS-APPELLANTS,

vs.

J. ARTHUR BROWN, et al. ..... RESPONDENTS.

and

UNITED STATES OF AMERICA, by RAMSEY CLARK, Attorney General of the United States, ... INTERVENORS-RESPONDENT.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES, FOR THE DISTRICT OF SOUTH CAROLINA, COLUMBIA DIVISION

By: MRS. ERNEST T. CRIBB, et al, ... INTERVENORS-APPELLANTS.

JURISDICTIONAL STATEMENT

CHARLES S. WAY, JR.
COMING B. GIBBS, JR.
J. C. LONG
90 Broad Street
Charleston, South Carolina
Attorneys for Intervenors-Appellants.

WALKER, EVANS & COGSWELL CO.—Printers of Distinction Since 1821—CHARLESTON, S. C. 75235

INDEX

	Page
Jurisdictional Statement	1
Opinion Below	2
Jurisdiction	2
Statutes Involved	2
Questions Presented	7
Statement	7
The Questions Presented are Substantial	9
Conclusion	14

Appendix—We hereby incorporate and crave reference to the Appendix filed in this Court by the South Carolina State Board of Education, a public corporate body, and Cyril B. Busbee, State Superintendent of Education, et al

CITATIONS

	Page
Angle vs. Chicago Ry. Co., 151 U.S. 1 (1894)	12
Arizona vs. California, 283 U.S. 423 (1931)	11
Board of Education vs. Allen, 20 L.Ed. 2d 1060 (1968)	10
Brown vs. Board of Education, 347 U.S. 483 (1954)	8, 9
Daniel vs. Family Security Ins. Co., 336 U.S. 220 (1949)	11
Fletcher vs. Peck, 6 Cranch 87, 3 Law Ed. 162	12
Griffin vs. State Board of Education, 239 F.Supp. 560 (1965)	11
New Ice Co. vs. Liebman, 285 U.S. 262 (dissent of Mr. Justice Brandeis)	10
Poindexter vs. Louisiana Assistance Commission, 275 F.Supp. 833, (1967) Aff. 389 U.S. 571 (1968)	11, 14
United States vs. Georgia Public Service Commission, 371 U.S. 285 (1963)	2
United States vs. O'Brien, 20 L.Ed. 2d 672 (1968)	11
Zorach vs. Clauson, 373 U.S. 306, 310 (1952)	11

STATUTES

28 U.S.C.A. 1253	2

CITATIONS (Continued)

	Page
28 U.S.C.A. 1331	7
28 U.S.C.A. 1343	7
28 U.S.C.A. 2101(b)	2
28 U.S.C.A. 2201	8
28 U.S.C.A. 2202	8
28 U.S.C.A. 2281	7
28 U.S.C.A. 2284	7
42 U.S.C.A. 1981	7, 8
42 U.S.C.A. 1983	7, 8
42 U.S.C.A. 2000(h)-2	8
Act No. 297, 1963 (53) 498, Supp., 1962 Code of laws for South Carolina, Sections 21-297 through 21-297.8	2, 3

BRIEF OF INTERVENORS-APPELLANTS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No.....

THE SOUTH CAROLINA STATE BOARD OF EDUCATION, a public corporate body, and CYRIL B. BUSBEE State Superintendent of Education, et al. .....APPELLANTS,

and

MRS. ERNEST T. CRIBB, et al, ...INTERVENORS-APPELLANTS,

vs.

J. ARTHUR BROWN, et al. .....RESPONDENTS.

and

UNITED STATES OF AMERICA, by RAMSEY CLARK, Attorney General of the United States, ...INTERVENORS-RESPONDENT.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES, FOR THE DISTRICT OF SOUTH CAROLINA, COLUMBIA DIVISION

By: MRS. ERNEST T. CRIBB, et al, ...INTERVENORS-APPELLANTS.

JURISDICTIONAL STATEMENT

JURISDICTIONAL STATEMENT

Intervenors-Appellants appeal from the judgment of the United States District Court for the District of South Carolina,

entered May 31, 1968 enjoining the enforcement of the South Carolina Scholarship Grant statute and submit this statement to show that this Court has jurisdiction of the appeal and that substantial questions are presented.

OPINION BELOW

The opinion of the United States District Court for the District of South Carolina, Columbia Division, convened as a three judge District Court is reported at.....F. Supp.....

JURISDICTION

Respondents instituted this action in the District Court seeking to enjoin implementation of the South Carolina Scholarship Grants Act of 1963. This Act provides for the payment of scholarship grants to every school child in South Carolina who has not yet finished high school, who desires to attend a private, non-parochial school in South Carolina, and lives in a School District which elects to make the Scholarship Grant Act available to children within the district. The Respndents asked a declaratory judgment that such Act is unconstitutional as in contravention of the equal protection clause of the Fourteenth Amendment. Judgment of the District Court was entered May 31, 1968 and its order denying a rehearing, a new trial and a modification of the judgment was entered June 27, 1968. Notice of Appeal was filed July 26, 1968 in the United States District Court, District of South Carolina, Columbia Division. This Court has jurisdiction of this appeal under 28 U.S.C.A. 1253, 2101(b). *United States vs. Georgia Public Service Commission*, 371 U.S. 285, 287.

STATUTES INVOLVED

The provisions of the Scholarship Grants Act of 1963 (1963 Acts 498, Supplement, 1962 Code of Laws for South Carolina,

Sections 21-297 through 21-297.8, are as follows:

STATUTES AT LARGE OF SOUTH CAROLINA
General and Permanent Laws—1963

No. 297

An Act To Provide State Scholarship Grants; To Fix The Amount Thereof; To Provide For The Supplementing Of Such Grants By The School Districts Of The State; To Vest In The State Board Of Education The Power And Duty To Make Rules Governing Scholarship Grants; To Fix Penalties For Misapplication Of Scholarship Funds And For Other Purposes,

Be it enacted by the General Assembly of the State of South Carolina:

SECTION 1. Findings of General Assembly.—The General Assembly finds that the cause of primary and secondary education in South Carolina will be advanced if individual children of school age, their parents and guardians, are made free to choose between public and private educational institutions. Provision has been made for the transfer of pupils from one public school to another, subject to such limitations as may be necessitated by local conditions, and it is considered highly desirable that the freedom to choose among available educational institutions be extended and enlarged by providing scholarship grants for children entitled to attend primary and secondary public schools who wish to attend private or independent institutions, such scholarship grants to be furnished from State funds supplemented by local school districts.

SECTION 2. Definitions.—The following words and phrases as used in this act shall, unless a different meaning

is plainly required by the context, have the following meanings:

(a) "School Child" shall mean any person between the ages of six and twenty whose domicile is with his or her parent within the State and who is otherwise qualified to attend the public schools of any school district in which he or she resides.

(b) "Parent" shall mean the natural or adoptive parent or the guardian having legal custody of a child eligible and entitled to receive a scholarship grant under this act who is actually paying or who will pay the tuition costs of attendance of such child at a school which qualifies such child to receive a grant under the terms of this act.

(c) "Private School" shall mean a private or independent elementary or high school which is not operated or controlled by any church, synagog, sect or other religious organization or institution.

SECTION 3. Persons eligible to receive scholarship grants.—Subject to the terms and provisions of this act every school child in the State who has not yet finished or graduated from high school and who desires to attend a private school located within the State shall be eligible for and entitled to receive a State scholarship grant in an amount equal to the per pupil cost to the State of public education as certified by the Governor.

SECTION 4. Funds for grants.—The State scholarship grants provided for in Section 3 of this act shall be payable from funds appropriated by the General Assembly for the payment thereof.

SECTION 5. Local school district to furnish funds.—It shall be a prerequisite to the grant above permitted that

the local school district in which the school child resides make available a grant of local funds to such school child and to that end the trustees of each school district within the State are hereby authorized to appropriate funds in addition to the State scholarship grants provided for in Section 3 of this act in such amount that is equal to the per pupil cost to the school district exclusive of all State funds received for such purposes. The trustees of each school district are authorized to levy taxes where the school district has the power to tax, to raise funds for the payment of such local supplements to the State scholarship grants. The State Board of Education shall render such assistance to the trustees as may be necessary to determine annual per pupil expenditures of the school district for the purpose of fixing the amount of any supplement to be paid under this section.

SECTION 6. Grant not to exceed tuition.—The total of the annual scholarship grant provided for each child by this act shall not exceed the actual cost of tuition at the private school attended by the child.

SECTION 7.—Rules and regulations.—The State Board of Education is hereby authorized and directed to promulgate such rules and regulations, consistent with the terms of this act, for the receiving and processing of applications for scholarship grants, the payment of grants and the administration of this act generally as it may find necessary or desirable. Such rules may, among other things, provide for the payment of scholarship grants by the school districts of the State to the parent of any child entitled to receive a scholarship grant in installments or otherwise, and for the proration of scholarships for children attending school less than a full school year; they

shall include a minimum academic standard that shall be met by any school in order to entitle children attending such school to receive a scholarship grant; *provided*, however, that no rule promulgated under the authority of this act shall restrict, or in any way affect, the requirements of such school concerning the eligibility of pupils who may be admitted thereto or specify minimum physical plant facilities of any such school.

SECTION 8. Unlawful to misuse scholarship funds.—It shall be unlawful for any person to obtain, attempt to obtain, expend or attempt to expend, any scholarship funds provided by this act for any purpose other than in payment of, or reimbursement for, the tuition cost of the child to whom such scholarship has been awarded at the institution he or she is authorized to attend under his or her scholarship grant.

SECTION 9. Penalties.—Any person convicted of violating the provisions of this act shall be punished by imprisonment for a term not to exceed three years or by a fine not to exceed two thousand dollars, or by both, in the discretion of the court.

SECTION 10. Saving clause.—If any portion of this act, or the application thereof to any person or circumstance is, for any reason, declared unconstitutional, such declaration shall not affect the validity of the remaining portions of this act or its application to other persons and circumstances.

SECTION 11. Repeal.—All acts or parts of acts inconsistent herewith are repealed.

SECTION 12. Time effective.—This act shall take effect upon approval by the Governor.

Approved the 5th day of June, 1963.

QUESTIONS PRESENTED

1. This appeal presents to the Supreme Court for the first time the question, whether a state can constitutionally enact a statute which would provide for funds to be paid to children or parents of children attending private non-parochial schools of their choice?

2. May a District Court of the United States declare a statute constitutional on its face, unconstitutional based on the Court's speculation as to the motive of the legislators in the enactment of the statute?

3. Is the South Carolina Scholarship Grants Act, which would be held constitutional in a non-southern state, rendered unconstitutional merely because the State of South Carolina has had a history of racial school segregation?

4. In a case where the effect of a state statute, constitutional on its face, *may* have the effect of perpetuating segregation in a particular application of the statute, is the appropriate relief permanent injunction declaring the entire statute unconstitutional, where the trial court could retain jurisdiction, and enjoin only the particular implementation of the statute which actually does result in perpetuating segregation?

STATEMENT

This action was commenced as a class action by Negro citizens seeking to enjoin the implementation of the South Carolina Scholarship Grants Act, alleging that the Act was passed for the purpose of depriving respondents of the equal protection of the laws under the Fourteenth Amendment and therefore is unconstitutional. The respondents alleged that jurisdiction for the action arose under the Fourteenth Amendment, and under 28 U.S.C.A. 1331, 1343, 2281, 2284 and 42

U.S.C.A. 1981, 1983, and asked declaratory relief for the class pursuant to 28 U.S.C.A. 2201, 2202 and Rule 57, Fed. Rules of Civ. Proc.

Mrs. Ernest T. Cribb and her fellow Intervenors-Appellants, are the parents of children attending East Cooper Private School, which is located in School District No. 2, Charleston County, State of South Carolina, which District had elected to utilize the South Carolina Scholarship Grant Act, and these parents, but for the order of injunction entered by the United States District Court, would have been entitled to receive tuition grant funds under the South Carolina Scholarship Grant Act. Mrs. Cribb and her fellow Intervenors-Appellants were allowed to intervene as parties Defendants in this action by order of the District Court on March 25, 1965.

The District Court of the United States issued *ex parte* orders dated March 9, 1965 and March 12, 1965, temporarily enjoining the making of payments under the Act until the case could be heard on the merits, and thereafter denied defense motions to vacate the temporary restraining orders.

The United States filed its complaint in intervention October 1, 1965, pursuant to The Civil Rights Act of 1964 (42 U.S.C.A. 2000(h)-2, alleging substantially the same facts as those alleged in the amended complaint of the original plaintiffs, and that the purpose and effect of the adoption and implementation of the Scholarship Grants Act was to unconstitutionally circumvent school desegregation requirements first enunicated in *Brown vs. Board of Education,* 347 U.S. 483 (1954).

The appellants, State Board of Education and the State Superintendent of Education, answering respondents' amended complaint and that filed by the United States, denied knowledge of any racial discriminatory policy of the several private schools mentioned in the complaint and denied the uncon-

situtionality of the statute. The defendant school districts denied any information as to discriminatory enrollment policies of the several private schools and denied the invalidity of the statute.

The Intervenors-Appellants filed answers in which they pled the validity of the Act on its face and in which they further pled that the Act, as applied to the school which their children attend, East Cooper Private School, was constitutional in effect. They further pled that the East Cooper Private School had no rules, regulations, by-laws or policy restricting enrollment to Caucasians, and that no Negro children had applied to the East Cooper Private School.

On May 13, 1968, the cause was heard before the Hon. Albert V. Bryan, Circuit Judge, the Hon. J. Robert Martin and the Hon. Robert W. Hemphill, District Judges, upon a written record, sitting as a three-judge District Court. In a *per curiam* opinion filed May 31, 1968, the Court said: "Act No. 297 is unconstitutional. A review of the record, including the historical background of the Act, clearly reveals that the purpose, motive and effect of the Act is to unconstitutionally circumvent the requirement first enunciated in *Brown vs. Board of Education*, 347 U.S. 483 (1954), that the State of South Carolina not discriminate on the basis of race or color in its public educational system." The Court permanently enjoined appellants from enforcing the statute. Appellants filed a motion for a rehearing, a new trial and for a modification of the judgment, which motion was denied by order of June 27, 1968.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The Court in *Brown vs. Board*, 347 U.S. 483, 493 (1954) said: "Today education is perhaps the most important function of state and local government." More recently in *Board*

of Education v. Allen, 20 L.Ed. 1060, 1068 (1968) the Court noted that private school education plays a significant role in raising the levels of knowledge. High quality education, whether public or private, is an "indispensible ingredient" in the kind of nation Americans desire.

Recognizing its responsibility to provide quality education for its children and to give to them the opportunity of finding this education in private or public schools South Carolina enacted the statute here in issue to give to every child the choice of attending a public school or a private non-parochial school located within the state. A scholarship grant equivalent to the per pupil cost to the State of public education was made available to the parent provided the school district made available the per pupil cost to the district of public education.

The General Assembly in Section 1 of the Act finds that the cause of education will be advanced if the school child is free to attend the school best fitted to his talent and ability, be it public or private. This finding that education is benefited if both public and private schools are available is supported by the uncontradicted evidence of educators found in the record here. There is no place in our industrialized society for the uneducated and the unskilled. States are seeking new ways and new methods to bring quality education to all children. This scholarship grant statute is one of the new ways. The need for education is so great that states should experiment even if some experiments fail. *New Ice Company vs. Liebman,* 284 U.S. 262, 311 (dissent by Mr. Justice Brandeis).

1. Intervenors-Appellants have been unable to find any decision by this Court declaring constitutional or unconstitutional, under the provisions of the Fourteenth Amendment, a state statute providing scholarship grants to children or parents of children who attend non-sectarian private schools of their

choice, in a factual situation where no other constitutional objections are raised.

A three judge United States District Court held that the State of Virginia could lawfully enact a scholarship grant program providing funds for children attending non-sectarian private schools. *Griffin vs. State Board of Education,* D.C. Va. (1965) 239 F.Supp. 560. The District Court in *Poindexter vs. La. Assistance Commission,* 275 F.Supp. 833 (1967) Aff. 389 U.S. 571 (1968) did not hold that, absent the racial problems, such a scholarship grant law constitutionally objectionable.

On the record before this Court, where only a very few students attending only two schools for one semester received such aid, the holding of the Court below is in effect a holding that a State cannot enact a valid scholarship grant law providing tuition aid to students attending non-sectarian schools.

Intervenors-Appellants respectfully submit that this presents an important, substantial question that should be decided by this Court.

2. In concluding that the South Carolina statute violated the Fourteenth Amendment because of the purpose and motive of the legislature the District Court departed from the firmly established rule that in passing on the constitutionality of statutes Courts do not consider the motives and purposes of the Legislature. *United States vs. O'Brien,* 20 L.Ed. 2d 672, 683 (1968); *Arizona vs. California,* 283 U.S. 423, 455 (1931); *Zorach vs. Clauson,* 373 U.S. 306, 310 (1952); *Daniel vs. Family Security Ins., Co.,* 336 U.S. 220, 223, (1949). If the legislature has the constitutional power to enact the statute the Court does not concern itself with its wisdom. *Angle vs. Chicago*

Ry. Co., 151 U.S. 1, 18. Even corrupt motive is not a question for judicial inquiry. *Fletcher vs. Peck*, 6 Cranch 87, 3 Law Ed. 162.

3. Your Intervenors-Appellants file this Jurdisdictional Statement with a certain sense of futility.

That the South Carolina Scholarship Grants Act, enacted by the United States Congress, or by the State of Michigan, would be held constitutionally unobjectionable is clear. Similarly, that a heavy burden, almost a presumption of unconstitutionality, lies upon any Statute affecting the schools located in South Carolina is also clear.

This is unfortunate for the State of South Carolina, its citizens, black and white, and for all of the citizens of the United States.

This case presents a substantial question which goes far beyond the legal issue presented. This case is important because it presents in an especially clear-cut manner whether or not the State of South Carolina, or any southern state, in a case with racial segregation overtones, can receive a full and impartial hearing under the traditional constitutional guidelines applicable where a Statute is charged on grounds that it violates constitutional provisions.

The reading of the Statute involved shows it to be completely and absolutely free of any racial reference, implicit or express. A cursory examination of the record will clearly demonstrate that the holding of the District Court that the motive, purpose and effect of the Statute is to circumvent the two historic *Brown* decisions is based entirely and solely on the fact that in the past South Carolina racially segregated its schools and that some of its citizens still prefer such schools.

We respectfully submit that the time has come in the history of this country for the Courts of the United States to give the citizens of South Carolina an opportunity to demonstrate that they can, in good faith, comply with the constitutional requirements affecting the schools.

A temporary injunction prevented your Intervenors-Appellants from receiving any funds under the South Carolina Scholarship Grants Act, and no child attending the East Cooper Private School has received the benefit of this Act.

We respectfully submit that the Order appealed from, which, as to the effect of the challenged Act is purely speculative, amounts to a denial by the Courts of the United States of your Intervenors-Appellants' right to the equal protection of the laws solely because they are southern Caucasians.

4. The relief granted to Respondents herein was permanent enjoining of the operation of the South Carolina Scholarship Grant Act.

The only persons receiving grants under the Act were the parents of children attending two schools, and these parents only received payment for one semester of school.

Given these facts we submit that the granting of such relief is entirely inappropriate.

The Courts of the United States have in the years since 1954 amply demonstrated that they are fully able to compel compliance with constitutional provisions by the schools of the south. In the event the State of South Carolina were to abolish its public school system and substitute for it, for the purpose of educating the children of the state, a scholarship grant program for private schools, we have no doubt that the United States District Court for the District of South Carolina would see that the substituted private school system would not be

operated in a manner which deprived Negro school children of the equal protection of the laws. The Courts would not, of course, hold that, in the absence of a public school system, an act similar or identical to the South Carolina Scholarship Grant Act, unconstitutional on its face, and would not, of course, completely enjoin its operation. The Court would, on a case by case and a school by school basis, apply the appropriate constitutional standards.

As regards what is appropriate relief, *Poindexter, supra,* should be compared on a factual basis with this case. In *Poindexter, supra,* a great many Louisiana private schools received the "preponderant" portion of their financial support from the state. In *Poindexter, supra,* the Court was able to see the *actual,* and not *speculative* affect of the Louisiana statute. In the case at bar, only five private schools are involved. Only two of these schools have ever received any money and those for only one semester, and all five of these schools are currently operating in a thriving condition. Your Intervenors-Appellants' children attend East Cooper Private School and have never received any money whatsoever from the State of South Carolina. The School itself has no policy, rule, or by-law which excludes children of any race. No Negro child has ever applied to the East Cooper Private School, despite invitations to that effect delivered to counsel for the Plaintiffs-Respondents during the course of this litigation.

Considering the delicate balance of our Federal System, it is respectfully submitted that to enjoin completely the operation of a state statute, upon this record, is inappropriate relief.

CONCLUSION

The questions present substantial federal issues which have been erroneously decided below. The Court should reverse

and remand to the District Court with instructions that it retain jurisdiction in the event respondents can show that the effect of the Act is unconstitutional, or in the alternative, should note probable jurisdiction and schedule the cause for a hearing on the merits.

Respectfully submitted,

CHARLES S. WAY, JR.

COMING B. GIBBS, Jr.

J. C. LONG
90 Broad Street
Charleston, South Carolina
Attorneys for Intervenors-Appellants.

Charleston, S. C.
September 19, 1968

CERTIFICATE OF SERVICE

I, J. C. Long, one of the attorneys for Mrs. Ernest T. Cribb, et al, Intervenors-Appellants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 23 day of September, 1968, I served copies of the foregoing Jurisdictional Statement to the Supreme Court of the United States on Counsel for the several parties thereto, as listed below by depositing or causing to be deposited in the United States Post Office in Charleston, South Carolina, with proper postage prepaid, copies of the aforesaid Jurisdictional Statement:

Klyde W. Robinson
U. S. District Attorney
Federal Courthouse
Columbia, South Carolina

Solicitor General
Department of Justice
Washington, D. C.

Matthew J. Perry, Esq.
Attorney at Law
1107½ Washington St.
Columbia, S. C. 29201

C. Walker Limehouse, Esq.
Attorney at Law
358 St. Paul, N.E.
Orangeburg, S. C.

A. T. Smythe, Esq.
Attorney at Law
P. O. Box 313
Charleston, South Carolina

Charles H. Gibbs, Esq.
Attorney at Law
23 Broad St.
Charleston, South Carolina

Shepard K. Nash, Esq.
Attorney at Law
Sumter, S. C.

J. C. LONG
Attorney for Mrs. Ernest T. Cribbs, et al,
Intervenors-Appellants
90 Broad St.
P. O. Box 242
Charleston, S. C.

Charleston, S. C.
September 23 1968

In the Supreme Court of the United States

OCTOBER TERM, 1968

Nos. 553 and 563

THE SOUTH CAROLINA STATE BOARD OF EDUCATION, ET AL., AND MRS. ERNEST T. CRIBB, ET AL., APPELLANTS

v.

J. ARTHUR BROWN, ET AL., AND UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA

MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, the United States moves that the judgment of the district court be affirmed.

OPINION BELOW

The opinion and order of the three-judge district court (J.S. in No. 553, pp. A1–A5) are not yet reported.

JURISDICTION

The district court's order was entered on May 31, 1968. Timely motions for rehearing were denied on

323-232—68

June 27, 1968 (R. 442). Notices of appeal in Nos. 553 and 563 were filed on July 26, 1968. The Jurisdictional Statement in No. 553 was filed on September 23, 1968, and the Jurisdictional Statement in No. 563 was filed on September 25, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1253.

QUESTION PRESENTED

Whether the district court correctly held that Act No. 297 of the 1963 South Carolina General Assembly providing financial aid for tuition to attend private schools is unconstitutional as a means of circumventing the constitutional requirement that the State not discriminate on the basis of race in its public educational system.

STATEMENT

This class action was instituted on March 5, 1965, by Negro residents of South Carolina, against State public school officials, appellants in No. 553, and officials of four school districts. The plaintiffs challenged the constitutionality of Act No. 297 of the 1963 Session of the South Carolina General Assembly (1963 S.C. Acts, p. 498; J.S. in No. 553, pp. 3–6) which provided tuition grants for students attending certain private schools. Upon a showing that the defendant public school officials were in the process of making payment under the statute, the district court issued temporary restraining orders against the making of payments until the case could be decided on the merits. Thereafter, appellants in No. 563, parents of children attending a private school approved under Act No. 297, were permitted to intervene as defendants in this

action, and the United States intervened as a plaintiff pursuant to Section 902 of the Civil Rights Act of 1964 (42 U.S.C. 2000h–2).

The district court held Act No. 297 unconstitutional and permanently enjoined its enforcement. The court found that (J.S. in No. 553, p. A2):

> A review of the record, including the historical background of the Act, clearly reveals that the purpose, motive and effect of the Act is to unconstitutionally circumvent the requirement first enunciated in *Brown* v. *Board of Education*, 347 U.S. 483 (1954), that the State of South Carolina not discriminate on the basis of race or color in its public educational system. * * *

ARGUMENT

1. The record in this case clearly establishes that the purpose and effect of the South Carolina tuition grant statute were to encourage, facilitate, and support the establishment of a racially segregated system of private schools to enable white students to avoid desegregated public schools. The statutory program was proposed to the legislature (see G. Ex. 1) approximately seven months after two school desegregation suits were instituted in South Carolina [1] and less than two weeks after the first court order to compel the

[1] The complaint in *Brown* v. *School District No. 20*, 226 F. Supp. 819 (E.D.S.C.), affirmed, 328 F. 2d 618 (C.A. 4), was filed on June 28, 1962 (Civil Action No. 7747 in the district court). *Gantt* v. *Clemson Agricultural College*, 213 F. Supp. 103 (W.D.S.C.), reversed, 320 F. 2d 611 (C.A. 4), certiorari denied, 375 U.S. 814, was instituted on July 7, 1962 (213 F. Supp. at 104).

admission of a Negro to an all-white school.[2] Between March 1964, when the legislature first appropriated funds for the tuition grant program (1964 S.C. Acts, No. 829, p. 1951), and March 1965, when payments were temporarily enjoined by the district court, five newly incorporated all-white private schools, each in a county where a school desegregation suit had been instituted,[3] applied for and received approval for participation in the program (G. Ex. 17–21, 34–39; G. Deposition Tr. No. 4 (Miss Mason) p. 22, No. 6 (Mr. Troxell) p. 25, No. 7 (Mr. Hassell) p. 63, No. 9 (Mr. Davis) p. 41, No. 10 (Mr. Wannamaker) p. 48).

2. The court below properly analyzed Act No. 297 in the context of its history and purpose. See, *e.g.*, *Reitman* v. *Mulkey*, 387 U.S. 369, 373; *Louisiana* v. *United States*, 380 U.S. 145; *Cooper* v. *Aaron*, 358 U.S. 1. In determining whether state action with respect to its public schools is designed to circumvent the obligations of the Fourteenth Amendment, it is necessary and appropriate for a court to examine the purpose underlying the challenged action. *Griffin* v. *County School Board of Prince Edward County*, 377 U.S. 218, 231. The historical context of such legislation is particularly relevant in view of the affirmative constitutional obligation of a State which has previously operated a dual system of public schools and

[2] The Court of Appeals for the Fourth Circuit ordered the issuance of an injunction in *Gantt*, *supra*, on January 16, 1963.

[3] *Adams* v. *School District No. 5*, 232 F. Supp. 692 (E.D.S.C.) (Wade Hampton Academy); *Randall* v. *Sumter School District No. 2*, 232 F. Supp. 786 (E.D.S.C.) (Thomas Sumter Academy); *Brown* v. *School District No. 20*, *supra* (East Cooper Private School, Miss Mason's School, and College Preparatory School).

the duty to exercise good faith in meeting this obligation. See, *e.g.*, *Green* v. *County School Board of New Kent County*, 391 U.S. 430, 437–438; *Cooper* v. *Aaron*, 358 U.S. 1, 7.

3. The court below correctly followed *Poindexter* v. *Louisiana Financial Assistance Commission*, 275 F. Supp. 833 (E.D. La.), affirmed *per curiam*, 389 U.S. 571; and *Lee* v. *Macon County Board of Education*, 267 F. Supp. 458 (M.D. Ala.), both of which rejected the "preponderant support" standard adopted in *Griffin* v. *State Board of Education*, 239 F. Supp. 560 (E.D. Va.). South Carolina was to have provided a substantial part of the support of the schools approved under Act No. 297 and, in addition, retained extensive control over their operation (see, *e.g.*, G. Ex. 29, 30, 34–63). The fact that these schools were able to survive the withdrawal of State funds does not mitigate the Act's necessary effect of encouraging and supporting the establishment of segregated private schools. As the court said in *Poindexter, supra*, 275 F. Supp. at 835, "[a]ny affirmative and purposeful state aid promoting private discrimination violates the equal protection clause. There is no such thing as the State's legitimately being just a little bit discriminatory." See, also, *Louisiana Education Comm'n* v. *Poindexter*, No. 284, this Term, decided October 14, 1968.

4. There is, of course, no controlling significance in the mere fact that the tuition grants would be available to Negroes as well as to whites. *Shelley* v. *Kraemer*, 334 U.S. 1; *Anderson* v. *Martin*, 375 U.S. 399. The court below determined that the purpose and effect of the statute were to enable the system of seg-

regated schools to continue, on the basis of a record which showed that the tuition grants would accomplish this objective by enabling white students to attend all-white private schools. Hence the equality in offering such grants to Negroes is as "superficial" as the equal right given Negroes to transfer schools in *Goss* v. *Board of Education*, 373 U.S. 683, 688.

5. Nor is there substance to appellants' claim that the decision below is invalid because of the district court's failure to make detailed findings of fact. Apart from the purpose and effect of the legislation, there were no material issues of fact requiring resolution by the district court (R., Vol. VI, p. 4). The court stated its finding as to purpose and effect in its *per curiam* opinion, as Rule 52(a), F.R. Civ. P., expressly authorizes.

CONCLUSION

For the foregoing reasons, the judgment of the three-judge district court should be affirmed.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

STEPHEN J. POLLAK,
Assistant Attorney General.

CAROL R. ARONOFF,
Attorney.

OCTOBER 1968.

U.S. GOVERNMENT PRINTING OFFICE: 1968

SOUTH CAROLINA STATE BOARD OF EDUCATION ET AL. *v.* BROWN ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA.

No. 553. Decided December 9, 1968.*

Affirmed.

Daniel R. McLeod, Attorney General of South Carolina, and *D. W. Robinson* for appellants in No. 553. *J. C. Long* for appellants in No. 563.

Solicitor General Griswold and *Assistant Attorney General Pollak* for appellee United States in both cases.

PER CURIAM.

The motion to affirm is granted and the judgment is affirmed.

*Together with No. 563, *Cribb et al.* v. *Brown et al.*, also on appeal from the same court.